

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma,)	
)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:05-cv-00329-GKF-PJC
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF THE STRATUS
CONSULTING EXPERTS UNDER F.R.E 702 AND INTEGRATED BRIEF**

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Defendants respectfully move the Court to exclude any testimony by the Stratus experts¹ concerning natural resource damages because their testimony lacks reliability and relevance as required by Federal Rules of Evidence 702 and 703, and 401, 402, and 403.

I. INTRODUCTION

CERCLA permits a trustee to recover natural resource damages resulting from a defendant's release of hazardous substances. 42 U.S.C. § 9607(a)(4)(c). "Congress intended restoration costs to be the basic measure of recovery for harm to natural resources." Ohio v. United States Dept. of Interior, 880 F.2d 432, 450 (D.C. Cir. 1989). Instead of seeking such restoration costs, Plaintiffs propose to use Stratus' testimony to provide an estimate of damages based on a survey methodology known as contingent valuation. But applicable regulations prohibit the use of contingent valuation to measure so-called "nonuse" values, as Plaintiffs did here. And every federal court who has considered it, has rejected contingent valuation as being too speculative and unreliable to measure natural resource damages. Moreover, the Stratus contingent valuation survey is neither reliable nor relevant because it presented Respondents with a fictional remedial solution and mischaracterized the alleged injury. It also violated clear guidelines on how contingent valuation surveys should be conducted.

II. BACKGROUND

Stratus used its contingent valuation survey to estimate over \$600 million in natural resource damages to the Illinois River ("River") and Lake Tenkiller ("Lake") (hereinafter jointly referred to as the "Watershed"). The survey consisted of a 98 page document of text and photos that was read aloud to a sample of randomly selected Oklahomans (the "Respondents").

¹ The Stratus experts are Mr. Chapman, Dr. Bishop, Dr. Hanemann, Dr. Kanninen, Dr. Krosnick, Dr. Morey, and Dr. Tourangeau.

Stratus R. Appendix A: Dkt. No. 1883-9. The survey described an alleged injury to the Watershed, and proposed a hypothetical solution to that injury. Respondents were then asked if they would hypothetically pay a given bid amount in additional taxes (known as “willingness to pay”) to implement the made-up solution. Each Respondent was given only one of six different bid amounts ranging between \$10 and \$405. Respondents learned about the alleged injury to the Watershed and proposed solution from the Stratus survey itself. Almost half of the Respondents had never visited the Lake or the River. Ex. T: Stratus R. Appendix D, Tables D.14, D.15 at D-7. And 68% had not heard anything about the alleged injury. Id. Table D.17 at D-7.

The Stratus survey is intended to measure “total values”, including both “use “ and “nonuse” values. Stratus defined “nonuse” values as values people place on natural resources for reasons other than personal use. Stratus’ damages estimate does not distinguish between use and nonuse values. According to Stratus, a person can have a nonuse value even if he is unaware of the Watershed or the alleged injury to it.

Initially, Stratus did not measure nonuse values. In 2004, Stratus prepared a document that estimated recreational damages to the Watershed at \$57 million to \$69 million (approximately \$540 million to \$550 million less than their current estimate) for past, present, and future damages. Ex. C: Bishop Dep. Exhibit 5, Monetary Damages Caused by Poultry Litter in the Illinois River Watershed and Throughout Eastern Oklahoma, Nov. 29-30, 2004. Then, to determine what the public actually thought about the condition of the Watershed, Stratus conducted two studies of actual users to determine impressions of water quality. Ex. U: Tourangeau Dep. Exhibit 3, Intercept Survey; Ex. V: Tourangeau Dep. Exhibit 4, Telephone Survey. Those two studies demonstrated that users had very good impressions of water quality. Ex. D: Bishop Dep. at 94:2-15; Ex. E: Morey Dep. at 34:12-35:6. In fact, only 3% of intercept

survey respondents mentioned poor water quality of the Lake (none mentioned clarity) and only 1.2% mentioned poor water quality of the River, most of whom were actually referring to debris in the water, not water quality. Ex. G: Desvousges R. at 7-8; Ex. U: Tourangeau Dep. Exhibit 3, Intercept Survey at 9.

Plaintiffs apparently did not like what actual users thought, so they decided “nonuse” values from people who had never heard of the Watershed and/or were unaware of any injury would result in higher damages. Stratus experts, Drs. Bishop and Morey, testified that they chose contingent valuation because it allowed them to “educate” Respondents about the “facts of the situation.” Ex. D: Bishop Dep. at 87:22-92:2; Ex. E: Morey Dep. at 37:14-39:1, Morey Dep. Exhibit 5. In other words, they could tell the Respondents what to think about the alleged injury.

Once Stratus had estimated damages based on its contingent valuation survey, it employed what it called a “benefits transfer” methodology to estimate past damages from the years 1981 to 2008. This involved multiplying the average willingness to pay number from its contingent valuation survey by 27 years and including a compound interest rate of 3.83%. Plaintiffs’ method of simply multiplying the willingness to pay at the same site over a long and arbitrary time frame to estimate past damages is an untested method that has not been peer reviewed or accepted by the scientific community. Ex. G: Desvousges R. at 121-22.

III. STANDARD OF ADMISSIBILITY OF EXPERT TESTIMONY

Scientific evidence must be both reliable and relevant to be admitted. Fed. R. Evid. 702. It is the Court’s role to determine whether proffered expert testimony is scientifically valid and thus reliable, and applicable to the facts at issue. In re Williams Sec. Litig. -WCG Subclass, 558 F.3d 1130, 1137 (10th Cir. 2009) (quoting Daubert v. Merrell Dow Pharm., 509 U.S. 579, 592-93 (1993)). To be admissible, expert testimony must reflect “scientific knowledge,” must be

“derived from the scientific method,” and must be “good science.” Daubert at 590. Proposed testimony must also be sufficiently tied to, or “fit,” the facts of the case. Mitchell v. Gencorp Inc., 165 F.3d 778, 781 (10th Cir. 1999), citing, Daubert, 509 U.S. at 591. The Court must “assess the reasoning and methodology underlying the expert’s opinion, then determine whether it is scientifically valid and applicable to a particular set of facts.” Burlington Northern and Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1030 (10th Cir.2007).

Reliability is based on the scientific rigor and methods behind the offered testimony. The Court should specifically consider reliability to evaluate admissibility. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 152 (1999). A number of factors help determine the scientific reliability of offered testimony, whether the science and methodology behind the offered testimony: (1) can be and has been empirically tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error; and (4) has gained general scientific acceptance in the relevant scientific community. Daubert, 509 U.S. at 593-594.

The Court may also consider an expert’s assumptions – whether the expert’s testimony is reasonably related to the data. Expert opinion should be excluded when it is speculative or not supported by the record. Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1995). “[T]rained experts commonly extrapolate from existing data. But nothing ... requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and opinion proffered.” Mitchell v. Gencorp Inc., 165 F.3d at 782 (citing General Elec. Co. v. Joiner, 118 S.Ct. 512, 519 (1997)).

Rule 702 requires that the evidence or testimony be relevant to, or “fit,” the facts of the case. Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1234 (10th Cir. 2004) (citing Daubert, 509 U.S.

at 591). A Court must exclude offered scientific testimony unless it speaks clearly to an issue in dispute in the case, and will not mislead the jury. Daubert v. Merrell Dow Pharm., 43 F.3d 1311, 1321 n.17 (9th Cir. 1995). Even if an expert's testimony is scientifically valid and follows reliable methodologies, it might not have sufficient bearing on the facts of the case. Id.

IV. ARGUMENT

A. There Is Substantial Disagreement In the Scientific Community About Using Contingent Valuation to Measure Nonuse Values

This is not the first time Stratus authors have tried to convince a court to admit a contingent valuation study. Stratus experts, Drs. Hanemann and Krosnick, performed a contingent valuation survey to estimate natural resource damages in United States v. Montrose Chem. Corp., No. 90-3122 (C.D. Cal April 17, 2000), but that study was rejected by the Court. Ex. H. Dr. Hanemann testified at his deposition that he was “struck by the similarities” between the Montrose study and this CV study. Ex. F: Hanemann Dep. at 23:11-24:14.

In fact, every federal case Defendants have found that has addressed the issue has determined that contingent valuation is unreliable and unsuitable for litigation. See, Kelley ex rel. Michigan v. Kysor Indus. Corp., 1994 U.S. Dist. LEXIS 21194 *64 n.17 (W.D. Mich. Oct. 27, 1994) (noting that the proposed method to measure natural resource damages for a contaminated aquifer “appears to be too speculative to provide a measure of damages acceptable in a court of law, based on the nature of the CVM methodology itself”); Ex. H: United States v. Montrose Chem. Corp., No. 90-3122 (C.D. Cal. April 17, 2000); Ex. F: Hanemann Dep. at 21:1-12; Idaho v. S. Refrigerated Transp., Inc., 1991 WL 22479 *19 (D. Idaho Jan. 24, 1991) (“[T]he study is not persuasive and it would be conjecture and speculation to allow damages based on this study... [T]he method selected by Idaho ... is legally insufficient to establish existence value in this case.”).

Both the National Oceanographic and Atmospheric Administration (“NOAA”) and the Department of Interior (“DOI”) have issued regulations or guidelines on the use of contingent valuation. Congress required the President to promulgate the DOI regulations. 42 U.S.C. § 9651(c)(1). Pursuant to CERCLA, those regulations are applicable to a trustee’s assessment of natural resource damages. Those regulations draw a distinction between use and “nonuse” values, and state that “estimation of option and existence values (i.e., “nonuse”) shall be used only if the authorized official determines that no use values can be determined. 43 C.F.R. § 11.83(c)(2)(vii)(d).² Stratus was aware of this regulatory restriction, but chose to ignore it. See Ex. B: Chapman Dep. Exhibit 5. (“Why should being able to measure use values rule out option and existence values [...]?”). Stratus knowingly chose to measure “total values” even though they had an opportunity to directly determine use values based on their own intercept and telephone surveys. Ex. G: Desvousges R. at 1.

Stratus also failed to comply with the recommendations of the 1993 NOAA “blue ribbon panel on contingent valuation.” See Ex. G: Desvousges R. Table 4.10 at p. 81-84. The NOAA Panel issued its guidelines because it determined a number of problems with contingent valuation including: results of contingent valuation studies are variable; sensitive to details of the survey instrument; vulnerable to upward bias; results cannot be validated; willingness to pay overstated; results inconsistent with assumptions of rational choice; responses seem implausibly large in view of the many programs for which individuals might be asked to contribute and the availability of substitute; difficulty to determine “the extent of market.” See Ex. S: NOAA

² This regulation was amended in October 2008, but the assessment began before the 2008 amendment. 43 C.F.R. 11.10 (“This part applies to assessments initiated after the effective date of this final rule.”). Statutes with a clearly expressed effective date will not be retroactively applied to actions taken before the effective date. Craig v. Eberly, 164 F.3d 490, 493-494 (10th Cir. 1998).

Panel R. at 10. The guidelines were designed to address these problems and Stratus' failure to follow them calls into question the Stratus survey.

The difficulty to determine the "extent of market" is particularly troubling here. According to Plaintiffs, "nonuse" values may theoretically extend to all members of society, resulting in a damage estimate completely dependent upon the selected market. As an illustration, most Americans likely hold a "nonuse" value for endangered birds. Assume, for the sake of argument, that a study was performed to assess this nonuse value as it relates to saving the lives of 100 birds in an estuary in Texas and the study estimated an average willingness to pay per respondent of \$100. If we assume that this number represented the nonuse value of the population, of say, Texas, the resulting damage estimate would be about \$2.4 billion. If it were extrapolated to the entire United States it would be about \$30 billion. That extrapolation arrives at an extreme result, but the methodology does not limit the extent of the market. As a result, Stratus extrapolated its average willingness to pay to 1,352,878 Oklahoman households, many of whom had never visited the Watershed.

A number of experts, including the Stratus experts, have recognized that contingent valuation is particularly unreliable when used to measure nonuse values. Stratus expert, Dr. Bishop, testified that inclusion of nonuse values "certainly has been contentious, particularly in the aftermath of the Exxon Valdez oil spill damage assessment, and associated with contentiousness was some controversy." Ex. D: Bishop Dep. at 57:4-59:20. Dr. Kevin Boyle, one of Plaintiffs' consulting experts, agreed, stating that nonuse values "are not well understood and defined" and that "there has been much more research conducted to investigate CV applications to use values than to nonuse values." Ex. I: Kevin J. Boyle & John C. Bergstrom, Doubt, Doubts, and Doubters: The Genesis of a New Research Agenda?, in Valuing

Environmental Preferences 183, 186 and 191 (Ian J. Bateman & Kenneth G. Willis eds., 1999). “CV research, as a cohesive investigation, is incomplete and many hard questions remain....In the mean time, a healthy dose of concern is important in the application, use, and interpretation of CV.” Id. at 184. Drs. Diamond and Hausman, economics professors at MIT, stated that “it is not appropriate to include CV measures of stated willingness to pay in either benefit-cost analysis or compensatory damage measurement.” See Ex. J: Peter A. Diamond & Jerry A. Hausman, On Contingent Valuation Measurement of Non-use Values, in Contingent Valuation. A Critical Assessment 3, 14 (Jerry A. Hausman ed., 1993).

One of the key criticisms of CV centers around a concept called “hypothetical bias,” or put simply, the difference between what a Respondent says that he will pay in a hypothetical survey and what he would actually pay in the real world. Ex. K: James J. Murphy & Thomas H. Stevens, Contingent Valuation, Hypothetical Bias, and Experimental Economics, Agricultural and Resource Econ. Assoc., 3312, Oct. 2004, at 182; see also Ex. G: Desvousges R. at 50. The existence of hypothetical bias has been well documented and “most research find significant divergence between stated and actual behavior.” Ex. L: Robert J. Johnston, Is Hypothetical Bias Universal? Validating Contingent Valuation Response Using a Binding Public Referendum, Journal of Environmental Economics and Management 52, 2006, at 469.

Where, as in this case, a majority of the Respondents were unaware of the alleged injury, the contingent valuation methodology is subject to significant manipulation. Ex. T: Stratus R. Appendix D, Table at D.17. Answers to survey questions can be sensitive to the information that is provided and the manner in which questions are asked. Ex. J: Diamond & Hausman, supra at 15. Differences in question wording, differences in question sequencing, and differences in individual interviewers can all have significant impacts on the range of answers. Ex. M:

Krosnick Dep. at 47:16-53:20 (the wording of the proposed injury and solution can affect WTP).

As set forth below, because the Stratus survey was not factually accurate, and in fact was partially fictitious, the resulting willingness to pay estimate is neither reliable nor relevant.

B. A Contingent Valuation Survey Must Be Factually Accurate to Obtain Accurate Results

Stratus experts testified that if the alleged injury or the proposed solution was factually inaccurate or incomplete, then the results are invalid since the Respondents will be providing a willingness to pay for the wrong injury. Ex. D: Bishop Dep. 112:24-115:25 (“if there is information in the survey that does not match what [the natural scientists] discovered, then there would be a problem with the survey”); Ex. N: Tourangeau Dep. 176:9-177:10 (“if the Respondent were presented different information, if they were bidding on a different recovery program or if they had a different picture of the damages, yes, I would expect that they would have different willingness to pay”); Ex. M: Krosnick Dep. 53:4-53:20 (the wording of the injury, questions, and solution can affect WTP).

Other experts agree. The description of the injury and proposed solution “is the crucial component of any CV study, because it tells respondents what they are buying and flaws in this information can undermine the entire valuation exercise....[a] number of studies have found the addition or deletion of information in commodity descriptions can have statistically significant effects on CV responses.” Boyle & Bergstrom, supra at 193. Dr. Kerry Smith, who according to Stratus expert Dr. Morey is “one of the probably top two or three environmental economists in the world” (Ex. E: Morey Dep. 141:15-142:6), did a peer review of the Stratus survey and made it clear that factual accuracy was of utmost importance:

- “Is everything factually correct and supportable from historical conditions, to the injury, to the restoration plan to the recovery time? If can not be supported, should not remain in the survey”; Ex. O: Tourangeau Dep. Exhibit 9, Peer Review Document at 1.

- “How confident are you in factual information? A real problem if not all information can be provided with the same level of precision. For example, you know the chicken numbers, but do not know the number of fish kills. IS there evidence to back up your fish-kill statement?”; [Id. at 3-4]
- “[A]re the alum sensors and dispensers at the border believable and real. Can the poultry industry refute the scenario due to incorrect statements about technology and treatments?” [Id. at 4]

The survey’s accuracy is even more important when, as in this case, the survey is attempting to measure “nonuse” values. See, e.g., Diamond & Hausman, supra at 10 (“Information plays a different role with regard to nonuse values” and creates “a clear difficulty in attempting to measure compensatory damages for the loss of nonuse value when an individual learns simultaneously about a resource’s existence and about an injury to it....”). As discussed below, because the Stratus survey was biased, misleading, and factually inaccurate, it should be excluded on both “fit” and reliability grounds.

C. The Proposed Solution in the Stratus Survey is Fictional

Stratus told Respondents that it was interviewing them about whether the State of Oklahoma should initiate an alum treatment program to clean-up the Watershed. Stratus R. Appendix A at A-14: Dkt. No. 1883-9. In fact, the State had no intention of using alum. The alum plan was simply invented by Stratus experts, stamped with the imprimatur of the State of Oklahoma, and provided to Respondents to get them to believe that the Watershed could be restored with alum.

The Stratus experts admit that there was no attempt to make the survey’s description of the alum solution consistent with the actual facts. In fact, Stratus experts vehemently claim that it is “immaterial to the validity of the results whether the mechanism generating the outcome [i.e., alum treatment] is fictitious as long as it is accepted by Respondents.” Hanemann Decl. Para. 11: Dkt. No. 1853-4; see also Ex. Q: Chapman Dep. at 146:7-148:19; (whether or not the

proposed solution would be implemented, or existed, was not important); Ex. N: Tourangeau Dep. at 56:13-57:13, 73:1-20; (feasibility of restoration plan not important). Ex. M: Krosnick Dep. at 112:9-113:15.

There is no dispute that the alum description in the survey is factually inaccurate. Plaintiffs' own remediation expert, Todd King, rejected alum as a viable treatment option due, in part, to alum's potentially damaging impacts on aquatic ecosystems. King R. at 12, 16, 19; Dkt. No. 1976-16. Defense expert, Dr. Connolly, confirmed that the proposed alum treatment program is not a viable or proven option and that it has potentially harmful effects on the environment. Ex. P: Connolly 3/30/09 R. at 15-28. But in their survey, Stratus tried to mislead Respondents into thinking that alum was safe. When Stratus was testing its alum story through focus groups, participants expressed concern about the harmful effects alum could have on the environment. Ex. D: Bishop Dep. at 124:16-125:1. Instead of acknowledging those concerns in the final survey, Stratus concluded that it would have to take measures to convince Respondents that alum was not harmful, despite the fact that Dr. King thought alum had harmful effects. Id. Among other changes to the survey, Stratus decided to show Respondents a photograph of an alum spice jar on a grocery store shelf in an effort to show that it was harmless. Id. (people were "distracted" by concerns about the potential unintended consequences of alum treatments so Stratus wanted a photo to alleviate those concerns); Ex. D: Morey Dep. at 99:5-24 (the alum photograph was intended to indicate that alum was safe and make people comfortable about putting it on the soil); Ex. N: Tourangeau Dep. at 107:8-13 (the experts intended the photograph of alum on the store shelf to make people confident that it didn't have adverse health effects).

Stratus also made up the efficacy of the alum program. It told Respondents that the alum program would restore the River and Lake to 1960 conditions in 10 years and 20 years,

respectively, and that the River and Lake would return to 1960 conditions in 50 years and 60 years, respectively, without alum treatment. Stratus R. Appendix A at A-18: Dkt. No. 1883-9. But, neither the 1960 baseline, nor the recovery timeframes are scientifically valid.

Stratus selected 1960 solely because it was the “good old days” and no one would actually remember what the water was like. As Dr. Bishop testified, it “went back far enough that we had no trouble with potential survey respondents wondering whether it was really that good back then, and so 1960 was as far back as we needed to go back and do that.” Ex. D: Bishop Dep. at 165:11-166:2; Ex. Q: Chapman Dep. at 138:2-139:8 (1960 provided a “reasonable touchstone about the quality of the environment before these changes”). Dr. Connolly concluded that Stratus’ selection of 1960 is flawed because: (1) it is not possible to determine water quality parameters in 1960 due to lack of data; and (2) changes in the last fifty years, such as deforestation and urbanization, have likely negatively affected water quality. Ex. P: Connolly 3/30/09 R. at 4-6. Furthermore, the photographs Plaintiffs used to illustrate 1960 conditions were not taken in the 1960s and likely do not represent 1960 conditions since there is no water quality data from that time. Ex. Q: Chapman Dep. at 183:21 – 185:12; Ex. P: Connolly 3/30/09 R. at 5-6. Stratus did not even attempt to get photographs from the 1960s because it wanted to make “sure the photos are accurately representing what we wanted them to do, and so photos from 1960 would look completely different.” Ex. Q: Chapman Dep. at 184:22-185:12.

The restoration timeframes used in the survey are also completely fictitious. Dr. Bishop testified that it was Stratus – and not any restoration expert – who decided to tell the Respondents that it would take 50 years to return the River to 1960 conditions. Ex. D: Bishop Dep. at 199:16-201:3 Dr. Connolly reported that “statements made by Stratus in their Survey

that the river and lake would recover to 1960's conditions in about 60 and 50 years, respectively, once poultry litter application was stopped, cannot be supported." Ex. P: Connolly 3/30/09 R. at 13-14.

The purpose of the survey was to estimate what Oklahomans were willing to pay for the alum program to accelerate restoration of the Watershed. Stratus R. at 109: Dkt. No. 1853-4. It follows that had Stratus told Respondents that restoration would take longer, the resulting willingness to pay and the ultimate damage estimate would have been smaller. Stratus experts, notably Drs. Bishop and Krosnick, admit that the hypothetical cleanup timeframes chosen by the state do impact a Respondent's willingness to pay. Ex. M: Krosnick Dep. at 153:22-155:2 (recovery time had an impact on WTP), 122:15-18 (the results of the CV survey could have been different if the recovery times had been different in the proposed solution); Ex. D: Bishop Dep. at 65:2-67:4 (the rate of hypothetical restoration could have affected WTP and damages). Because the State made up the entire restoration scenario, it could adjust that scenario to obtain any result it wanted. As a result, the Stratus survey is not reliable or relevant to measuring actual damages.

D. Stratus' Description of the Alleged Injury Is Biased and Misleading

As indicated above, the results of the Stratus intercept and telephone surveys demonstrated that most users thought the water quality was good. Ex. U: Tourangeau Dep. Exhibit 3, 2006 Intercept Survey at 9; Ex. V: Tourangeau Dep. Exhibit 4, 2007 Telephone Survey at 8. Despite this, Stratus survey left Respondents with an impression that water conditions are much worse than they actually are. Ex. P: Connolly 3/30/09 R. 11. This exaggerated injury description led Stratus' peer reviewer, Dr. Smith, to comment that "[s]ome Respondents may be currently given the impression that the waters have been destroyed and this

is causing the higher than expected proportions of “yes” responses to the valuation question.”

Ex. O: Tourangeau Dep. Exhibit 9, Peer Review Document at 3. Examples of the many inaccurate statements from the survey include:

- “Algae also float in the water and can make the water look murky. The water in the river used to be clear most of the time. Now, during summer, the water is sometimes murky because of algae.” Stratus R. Appendix A at A-10: Dkt. No. 1883-9. This statement is allegedly based on Dr. Stevenson’s opinions; however, the description omits his prefacing statement that “waters were usually relatively clear.” Ex. P: Connolly 3/30/09 R. at 7 (quoting Ex. R: Stevenson R. at 22). Dr. Connolly’s analysis of the same data concludes that algal levels causing murky conditions are rare. Id. at 7-8.
- “Algae on the bottom and in the water have changed the types of plants and animals that live in the river. There are now fewer of the smallmouth bass, other fish, and small plants than used to live in the river. In some places, the algae uses up most of the oxygen in the water. Low oxygen causes fish to grow more slowly. And in some places, some species have probably disappeared completely because of the algae.” Stratus R. Appendix A at A-10: Dkt. No. 1883-9. Dr. Connolly evaluated the same biological data as Dr. Stevenson and found that the fisheries were not damaged. Ex. P: Connolly 3/30/09 R. at 8.
- “In many parts of the lake where the oxygen and temperature were ideal for smallmouth bass and other types of fish people catch, there is now so little oxygen during the summer that these areas are no longer ideal for these fish. Under such conditions, smallmouth bass and the other types of fish grow slower and there are fewer of them.” Stratus R. Appendix A at A-11: Dkt. No. 1883-9. This description is a “gross approximation” of the opinions of Drs. Cooke and Welch, ignores impacts from the construction of the dam to form the Lake, and fails to mention that it is a “premier” fishery. Ex. P: Connolly 3/30/09 R. at 9-10; Online Eds., Photo Gallery: The Best Fishing Towns in America, Field and Stream, Jan. 8, 2008 at <http://www.fieldandstream.com/photos/gallery/kentucky/2008/01/best-fishing-towns-america?photo=15> (naming Tahlequah as one of the best fishing towns in America).
- “In the late 1950s and early 1960s, the water in the river was clear most of the time, and it was easy to see rocks on the bottom. Smallmouth bass and other fish had lived in the river for centuries. They ate small animals and insects living in the river. In the lake, the water was clear enough so you could see down about 10 feet. Many largemouth bass, smallmouth bass, and other fish were there, and they also ate small animals, insects, and plants living in the water and on the bottom. Many people visited the area around the river and lake for sightseeing, fishing, canoeing, boating, and other activities.” Stratus R. Appendix A at A-8: Dkt. No. 1883-9. This description provides the impression that the water was clearer historically and that visitation has been affected by the alleged injury. However, visitation has increased dramatically over time, as acknowledged by Mr. Chapman and documented by Drs. Desvousges and Rausser. Ex. Q: Chapman Dep. at 49:14-19 (noting that they had evaluated visitation data and that “overall, it was

increasing”); Ex. G: Desvousges R. at 15 (rising from approximately 775,000 visitors per year at Lake Tenkiller to approximately 3,000,000 in 2007). In addition, there is no support in the record for the contention that visibility extended 10 feet in 1960. Available data from the mid-1970s indicate that visibility extended about four feet in the riverine portion of Lake Tenkiller. Ex. P: Connolly 3/30/09 R. at 4, 10.

Not only are these statements contrary to the actual conditions, they also mischaracterize Plaintiffs’ own injury experts. Dr. Bishop was the Stratus expert primarily responsible for ensuring the accuracy of the injury description in the survey document. Ex. D: Bishop 97:22-98:1; Ex. Q: Chapman 234:21-235:2; Ex. F: Hanemann 38:1-15; Ex. M: Krosnick 111:8-23. In his testimony, Dr. Bishop concedes that Stratus had to process the information provided by natural scientists, summarize it in terms that they thought Respondents would understand, and that it was always “a judgment call on my part” whether the information provided by the scientists was accurate. Ex. D: Bishop Dep. at 97:6-21, 99:2-18. Moreover, Stratus began drafting the survey prior to the time that Plaintiffs’ natural scientists had reached conclusions regarding the alleged injury. Ex. F: Hanemann Dep. at 58:21-59:7.

Stratus also used photographs that were misleading. The project manager of the Stratus team, Mr. Chapman, testified that “I don’t think ... it matters whether it’s that specific lake or a nearby lake as long as it’s adequately presenting the information you’re trying to present.” Ex. Q: Chapman Dep. at 106:17-107:17. As a result, the photographs are not representative of conditions in the Watershed on a year-round basis. Ex. G: Desvousges R. 41-42; Ex. O: Tourangeau Dep. Exhibit 9, Peer Review Document at 3 (“Is the resolution of photographs portraying algae how it really looks in the water on a typical day?”). As one Respondent noted, “[t]he pictures are taken to specially convince me about the algae. The picture cards e, f and g are taken to make me vote for them.” Ex. G: Desvousges R. at 41. Dr. Connolly notes that the photograph of algae on card F “may very well be the exception more so than the normal condition for benthic algal biomass.” Ex. P: Connolly 3/30/09 R. at 8.

E. The Survey Does Not Measure Damages Caused By Defendants

Stratus estimates total natural resource damages in the Watershed, regardless of the source of the phosphorus and made no attempt to calculate damages caused by the Defendants. Defendants. Ex. D: Bishop Dep. at 54:18-55:10 (noting that the report does not include calculation of damages attributable only to poultry industry and expressing no opinion on this value); Ex. O: Chapman Dep. at 49:24-50:4, 239:3-9; Ex. N: Tourangeau Dep. at 32:14-17. As a result, Stratus' opinion regarding estimated damages is irrelevant to the Plaintiffs' claims. It is not possible to simply multiply the Stratus damages estimate by the percentage of total phosphorous loading in the Watershed since: (1) even if Plaintiffs could demonstrate that poultry litter is presently a source of phosphorus loading (which Defendants do not concede), the loading due to the application of poultry litter would not have remained constant over time, and (2) Plaintiffs have provided no evidence to support a method to assign a portion of the total damage estimate to Defendants. Ex. D: Bishop Dep. at 54:11-55:10. For these reasons, the Stratus damages estimate must be excluded as it does not "fit" the case against Defendants.

F. The CV Survey is Unreliable

In order to be admissible, the Stratus testimony must be scientifically valid. Even if courts and scientific experts accepted contingent valuation as a scientifically valid way to measure nonuse damages, the Stratus survey does not comply with scientific literature and regulatory guidelines, and is therefore unreliable.

1. The Design of the Stratus Survey Is Not Reliable

As set forth above, both the injury description and the proposed solution are factually inaccurate. In addition, the survey was not balanced. For example, the survey states that "about 140 million chickens and turkeys are now raised each year near the river in Oklahoma and

Arkansas. This produces more than 300 thousand tons of what is called ‘poultry litter’ each year.” Stratus R. Appendix A at A-13: Dkt. No. 1883-9. The survey also states that “about 60% of the phosphorous in the river and lake is from chickens and turkeys.” Id. But this information about the poultry industry is irrelevant because the Stratus survey was designed to measure damages from all sources of phosphorous, not just from the Defendants. Ex. N: Tourangeau Dep. at 125:12-126:9 (stating that he is “not sure why” this information was included in the survey); Ex. F: Hanemann Dep. at 241:18-242:2 (“If a Respondent answered the survey with the motivation of punishing the poultry industry or whatever, that would influence – that could influence the person’s response”).

The survey also includes a statement that tells the Respondents the State has told the Respondents to assume that a federal court has banned the application of poultry litter, even though this court has not entered such an order. As a result, Respondents are more likely to vote for the alum program because they were left with the impression that application of poultry litter was a serious problem, and that the poultry industry was responsible. See Ex. G: Desvousges R. at 42-43. The significant bias and error injected into the damage estimate by such statements can only be evaluated through another survey. Ex. D: Bishop Dep. at 155:8-13.

The Stratus survey failed to include several key recommendations of the NOAA Panel, even though Stratus claimed to comply with them. Ex. S: NOAA Panel, www.darp.noaa.gov/library/pdf/cvblue.pdf. The survey did not include a no-vote option (i.e., an option that is neither “yes” or “no”) despite the fact that exclusion likely increased willingness to pay. Ex. Q: Chapman Dep. at 173:1-11; Ex. G: Desvousges R. at 57 (that 9 to 30 percent of Respondents choose the no-vote option when offered). The survey also failed to provide information about substitute waterbodies, despite NOAA guidelines, peer review comments, and

recommendations made in a 1994 article authored by Dr. Hanemann. Ex. O: Tourangeau Dep. Exhibit 9, Peer Review Document at 1 (recommending that the survey include information on substitutes); Ex. F: Hanemann Dep. at 110:20-112:20 (referring to his 1994 article discussing the need to identify substitutes). The failure to provide substitutes can affect willingness to pay. Id. at 195:7-12 (agreeing that WTP varies based on their perception of whether there are options or replacements for that good or service).

2. Stratus' Data Manipulation Renders the Estimated Damages Unreliable

Converting Respondents' answers into an average willingness to pay value requires significant data manipulation using complex econometric principles. The results are sensitive not only to the way in which answers are "coded" (i.e., how a Respondent's open ended answer is translated into a numerical value), but also to the statistical methods employed to process the coded results. Ex. I: Boyle & Bergstrom, supra at 194. As a result, Stratus was required to make decisions regarding the validity of a response based on other information known about the Respondent. For example, proper survey methodology required Stratus to determine whether to discard or discount a Respondent's answer if he did not comprehend the survey; was distracted; thought that his willingness to pay amount would be used to remedy a larger environmental injury than indicated or remedy conditions at other sites; thought that the proposed remedy would work faster than indicated; or thought that he would never have to actually pay the bid amount. Ex. G: Desvousges R. at 44-50; Ex. S: NOAA Panel at 10. Although the results of the Stratus survey show that many Respondents fit into one or more of these categories, Plaintiffs did not eliminate any votes, thereby increasing the overall damage estimate. Ex. Q: Chapman Dep. at 191:3-192:1 ("we didn't eliminate votes from our analysis anywhere"), 198:2-25; Ex. F:

Hanemann Dep. at 117:16-118:5, 119:22-120:4, 124:3-24; Ex. M: Krosnick Dep. at 173:7-23, 176:12-20; Stratus R. at 6-37 – 6-42: Dkt. No. 1853-4.

Defendants' experts, Drs. Desvousges and Rausser, illustrate the sensitivity of the study's damages estimate by eliminating individuals who said they would pay to implement the alum program, but also stated they believed that the tax would be used to clean up lakes and rivers outside the Watershed; thought alum treatments might occur without a ban; were unsure of their vote; paid no income tax or received a full refund; and/or thought that restoration would be faster than described. Recoding these individuals decreased the damages estimate by 78.5%, demonstrating the lack of reliability in the survey results. Desvousges R. at p. 104, Table 7.

3. The CV Survey Is Unreliable Due to Non-Response Bias

Approximately 45% of the selected sample refused to participate in the survey. This 55% response rate is substantially below the rate recommended by both NOAA (70%) and the Office of Management and Budget (80%). Ex. G: Desvousges R. at 78-79. U.S. OMB 2003, Circular A-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>. Such high "non-response rates" call into question the survey's validity because the damages estimate was generated from a subset of Respondents who may not share the values and attitudes of the larger population. Ex. S: NOAA Panel at 30. ("[h]igh nonresponse rates would make the survey results unreliable").

4. The CV Survey Is Unreliable Because Stratus Cannot Establish an Error Rate

One factor courts consider in determining the reliability of a scientific study is error rate. 51 Fed. Reg. 27751. ("External validation is an important part of any scientific research because it allows the researcher to evaluate the plausibility of data, assumptions, and any model predictions. Such validation is particularly crucial for a damage assessment because claims are

required to be reduced to a ‘sum certain.’”) In this case, however, Stratus has not attempted to establish an error rate due, in part, to the fact that it is impossible to externally validate the results of contingent valuation studies that estimate nonuse values. Ex. G: Desvousges R. at 60-61 (“[i]deally, one would like to assess the validity of a hypothetical value by comparing with the true value. But the true value is usually not known, so this option is not available” (internal citations omitted)); Ex. S: NOAA panel at 6.

Plaintiffs could have attempted to validate the use value component of their results with actual visitation data and use information (including their own intercept and telephone surveys), but they chose not to do so. Ex. Q: Chapman Dep. at 49:4-23 (evaluated change in visitation in the IRW and determined that “overall, visitation was increasing”), 59:6-9 (did not compare CV responses to responses in intercept survey); Ex. N: Tourangeau Dep. at 132:13-133:8 (did not compare the results for the telephone survey or intercept survey with the results of the CV survey as it wasn’t “our goal”). The failure to validate the use component of the contingent valuation survey with actual use data likely resulted from the fact that recreational use is strong and continues to increase, a concern raised during the peer review. Ex. O: Tourangeau Dep. Exhibit 9, Peer Review Document at 1.

One possible method to evaluate the reliability of the Stratus survey is to compare the results with standard economic principles such as demand elasticity (i.e., the responsiveness of a change in demand due to change in price) and income elasticity (i.e., responsiveness of a change in demand due to change in income). Ex. G: Desvousges R. at 98. Typically, an increase in price will have a corresponding decrease in demand for goods that are not necessities, and an increase in income will correlate with an increased willingness to pay. Ex. G: Desvousges R. at 98 (citing numerous studies supporting these behaviors). But, the results of the Stratus survey

are inconsistent with these basic economic principles, an indication of unreliability and a high error rate. For example, when the bid amount increased from \$80 to \$125, the number of Respondents voting “yes” also increased, violating demand elasticity. In addition, there is no consistent relationship between a Respondent’s income and the amount they were willing to pay. In fact, the Respondents with incomes less than \$13,000 per year had the highest willingness to pay in the Stratus survey. Ex. G: Desvousges R. at 100-101.

G. The Past Damages Study Fails Daubert’s Relevancy and Reliability Tests

1. The Results of the Past Damages Study Are Unreliable

Plaintiffs estimated past damages by simply taking the damages estimate from the contingent valuation survey, multiplying it by 27 (the number of years from 1981-2008), and including compound interest at a rate of 3.83%. Plaintiffs claim to have employed a “benefits transfer” methodology, but benefits transfer typically involves taking willingness to pay from one geographic area and applying it to another geographic area without extrapolation of the value over a large time period. Ex. G: Desvousges R. at 121. Plaintiffs’ method of simply multiplying the willingness to pay at the same site over a long and arbitrary time frame to estimate past damages is an untested method that has not been peer reviewed or accepted by the scientific community. Id. at 121-22. The few studies that have considered the projection of willingness to pay over time have all evaluated the use of willingness to pay across future time periods, not the past. One study, projecting recreational values forward over a 20-year period, found error rates of 25-300 percent. Id. at 122. Even the traditional benefits transfer method has been subject to much scrutiny and determined to be unsuitable for use in litigation. Id. at 124-125 (“if benefits transfer is used as a basis for determining just compensation in the context of [NRD] litigation, the costs of a wrong decision to individuals and society could be quite high”).

Plaintiffs' expert, Dr. Krosnick, succinctly explained why Stratus' own method was faulty, testifying: "there's no reason why your willingness to pay for a Mazda today should be the same as your willingness to pay for a Volkswagen 20 years from now or someone else's willingness to pay for a Volkswagen 20 years from now." Ex. M: Krosnick Dep. at 56:1-59:15.

Plaintiffs did not establish an error rate for their past damages methodology and no known error rate exists for such a methodology. See Daubert, 509 U.S. at 593-594 (scientific methodology should have a known rate of error). Furthermore, Plaintiffs selection of 1981 is unsupported and arbitrary. No justification is provided in the report, and the record indicates that the experts working on the past damages report switched the end-date from 1986 to 1981 approximately five days before the report was due, increasing the past damages estimate by approximately \$30 million. Ex. D: Bishop Dep. at 188:25-191:4, 192:17-193:5.

2. The Results of the Past Damages Study Are Irrelevant

Plaintiffs were forced to make a number of assumptions in their past damages calculation. Most notably, they assumed that water quality was the same from 1981-present, that the willingness to pay was constant, and that individual's preferences and values did not change over that 17 year time period. It is well established, however, that a Respondent's willingness to pay is based on a number of beliefs and opinions as well as the availability of substitute resources and budget constraints. Ex. N: Tourangeau Dep. at 137:16-138:11; Ex. D: Bishop Dep. at 64:6-65:1. It is hard to imagine that these beliefs, options, and preferences were constant over this time period. Even if water quality was, for the sake of argument, unchanged from 1981-present, Plaintiffs ignored any changes in potential phosphorous. Phosphorous loading to the IRW from each source has undoubtedly changed over this time period, and data demonstrate that the number of poultry houses has changed since 1981. Fisher 9/3/2008 Dep. at 128:20-129:20: Dkt.

No. 2085-3 (decrease of 10 million birds over a two-year period). Therefore, the past damages value cannot be used to calculate damages caused by Defendants.

The past damages estimate is also irrelevant as it relies upon the willingness to pay the faulty contingent valuation survey. Ex. D: Bishop Dep. at 119:24-120:10 (“to the extent that the [value from the main study] is inaccurate, that inaccuracy would carry over to the past damages report”); Ex. F: Hanemann Dep. at 168:25-169:7 (noting that the two major factors affecting accuracy of the benefits transfer method are the accuracy of the value transferred and the comparability of the circumstances to which it’s being applied). Therefore, if the Court excludes that contingent valuation study, it must also exclude the past damages report.

V. CONCLUSION

Because the Stratus damages experts measure damages based on a fictitious restoration program and a flawed contingent valuation survey of nonusers of the River and Lake, Defendants respectfully request that the Court enter an order excluding any testimony regarding - its estimate of natural resource damages as reflected in “Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma’s Illinois River System and Tenkiller Lake” or its estimate of past damages as reflected in “Natural Resource Damages Associated with Past Aesthetic and Ecosystem Injuries to Oklahoma’s Illinois River System and Tenkiller Lake.”

Respectfully submitted,

June 19, 2009

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